Ibrahim Mohamad & Anor v Public Prosecutor and another appeal

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–101 OF 2009 (D) and 05–97 OF 2009 (D)
ZULKEFLI MAKINUDIN, JAMES FOONG AND ABDULL HAMID FCJJ
11 MARCH 2011

Criminal Procedure — Dangerous drugs — Trafficking — Whether unsafe to convict for trafficking — Accused were the only occupants in car when it was stopped and found to contain huge cache of cannabis — Owner of car never testified at trial — Whether failure to call car owner caused gaps in prosecution's case — Whether prosecution failed to establish how long accused were in possession of the car and failed to exclude possibility others had access to it prior to arrest of accused — Whether evidence did not show accused had custody control and knowledge of the drugs — Whether mere fact accused were in car at material time did not prove they had mens rea possession of the drugs — Whether conduct of accused running away from scene when police were searching the car could not be inferred to mean they had knowledge of the drugs — Whether accused had given satisfactory explanation why they ran away — Evidence Act 1950 s 9

Both the appellants herein were travelling in a car driven by the second appellant when they were stopped by police at a road block. The police were acting on a tip-off and they wanted to search the car. When the appellants overhead the officers say 'ada ganja' while they were searching the vehicle, they bolted but were caught and arrested after a chase. From the back seat rest of the car the police officers found 40 transparent plastic packages that were eventually found to contain a total of 38,499.68g of cannabis. The appellants were charged in the High Court for trafficking in the drug under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and were convicted and sentenced to death. The Court of Appeal ('COA') dismissed their appeal against conviction and sentence. Both the High Court and the COA held that the appellants were in custody and control of the cannabis by virtue of their having been in custody and control of the car and that their act of running away while the car was being searched showed they had knowledge of the drugs. In the instant appeal against the COA's decision, the court was focused on the question whether, on the evidence adduced by the prosecution, it could safely be concluded that the appellants had mens rea possession of the cannabis in the car independent of the statutory presumption under s 37(d) of the DDA.

Held, allowing the appeals, substituting the trafficking conviction and sentence with a conviction for possession under s 6 of the DDA and sentencing

both appellants to 20 years' jail and 10 mandatory strokes of whipping:

(1) It was unsafe to convict the appellants for trafficking under s 39B(1)(a) of the DDA. But since they were in possession of the vehicle in which the cannabis was found and applying the presumption under s 37(d) of the DDA, they were deemed to be in possession of the drugs. As the law did not permit double presumption, the appellants could not be said to have been trafficking in the cannabis in the absence of any evidence to show that there was direct trafficking (see para 22).

(2) The only evidence the trial judge relied upon to conclude that the appellants were in custody or control of the drugs was that (a) at the material time, one of them was driving the car while the other was the passenger, and (b) the first appellant was summoned for driving the car without a licence about six months earlier. The owner of the car ('Zainuddin') was never called to testify at the trial. There was nothing to suggest what happened to the vehicle between the period the first appellant was summoned for driving the car without a licence and the date the appellants were arrested in the present case. There was no evidence to prove that both the appellants were exclusively in custody and control of the car before their arrest. There were so many inferences that were favourable to the appellants that could be made from the facts; the car could have been previously rented to a third party or Zainuddin could have had possession of the vehicle after the summons incident. All these inferences, which had the effect of casting reasonable doubt on the element of custody and control, were never considered by the courts below, and that was a misdirection in law (see paras 7–9).

(3) The prosecution had a duty to call all necessary witnesses essential to the unfolding of its narrative but this was not done in the present case. Zainuddin, being the owner of the car, held the key to the unfolding of events, and without his evidence there were gaps in the prosecution's case. The question of how the vehicle came to be in the custody and control of the appellants remained unanswered. The failure to call Zainuddin, or at the very least to tender under s 32(1)(i) of the Evidence Act 1950 the statement that was recorded from him, raised the question as to who was in actual control of the car prior to the date the appellants were arrested (see paras 10 & 13).

(4) The police raiding party was acting on a tip-off. The then Supreme Court in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 had held that in a tip-off case, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility. That case highlighted the danger of relying on a tip-off as there was a possibility that in such cases drugs might be planted to implicate the accused; hence, the need for the prosecution to exclude the possibility that other individuals might have had access to the drugs in

question. In the instant case, the prosecution failed to exclude the possibility that others might have had access to the car prior to the day the appellants were arrested. There was no evidence to show for how long the appellants had been in possession of the car (see paras 11–12).

(5) The courts below inferred from the appellants' conduct of fleeing from the scene that they had knowledge of the drugs. Their conduct was actually consistent with the contention that they only fled when they heard the policemen saying 'ada ganja' during the inspection of the car. The mere act of them running away could not be interpreted to mean they had prior knowledge of the drugs because their conduct was also consistent with the act of an innocent man who in similar circumstances would have panicked and tried to evade arrest when wrongly suspected of committing a crime. Both appellants had discharged the onus of explaining their conduct under s 9 of the Evidence Act 1950. The inference that the appellants had no knowledge of the drugs in the car could be made from the fact that since the road that led to the police road block was straight and the accused could have easily seen the road block from afar they could have made a U-turn or attempted to escape before they approached the road block. Similarly, after stopping at the road block, the appellants had co-operated with the police and did not bolt immediately upon being told to alight from the vehicle (see paras 16–18 & 21).

(6) Even if the appellants had custody or control of the car when it was stopped by the police, this did not mean they had custody or control of the drugs in the absence of other incriminating evidence. It could not give rise to the inference that the drugs belonged to them. In law, having only custody or control was insufficient to establish 'possession'. The physical act of custody or control had to be accompanied by evidence that the accused had knowledge of the drugs. In the absence of any statutory presumption, knowledge had to be proven either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both was insufficient in law to constitute possession, let alone trafficking (see paras 14–15).

[Bahasa Malaysia summary

Kedua-dua perayu di sini menaiki kereta yang dipandu oleh perayu kedua apabila mereka ditahan oleh polis di sekatan jalan. Polis bertindak atas maklumat dan mereka hendak memeriksa kereta tersebut. Apabila perayu-perayu terdengar pegawai-pegawai berkata 'ada ganja' semasa mereka memeriksa kenderaan tersebut, kedua-dua mereka cuba melarikan diri tetapi dapat ditangkap dan ditahan selepas kejadian mengejar. Daripada penyandar tempat duduk kereta pegawai-pegawai polis menemui 40 paket plastik lutsinar yang akhirnya didapati mengandungi kanabis sebanyak 38,499.68g. Perayu-perayu dituduh mengedar dadah di Mahkamah Tinggi di bawah s

39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan disabitkan dan dijatuhkan hukuman mati. Mahkamah Rayuan ('MR') menolak rayuan mereka terhadap sabitan dan hukuman. Kedua-dua Mahkamah Tinggi dan MR memutuskan bahawa kanabis dalam jagaan dan kawalan perayu-perayu oleh kerana kereta tersebut dalam jagaan dan kawalan mereka dan tindakan melarikan diri semasa kereta diperiksa menunjukkan mereka mempunyai pengetahuan terhadap dadah tersebut. Dalam rayuan ini terhadap keputusan MR, mahkamah fokus ke atas soalan sama ada, atas keterangan yang dikemukakan oleh pihak pendakwaan, ia adalah selamat untuk memutuskan bahawa perayu-perayu mempunyai milikan mens rea terhadap kanabis dalam kereta tersebut bebas daripada anggapan statutori di bawah s 37(d) ADB.

Diputuskan, membenarkan rayuan-rayuan, menggantikan sabitan dan hukuman mengedar dengan sabitan untuk milikan di bawah s 6 ADB dan menjatuhkan hukuman 20 tahun penjara dan 10 sebatan rotan:

(1) Adalah tidak selamat untuk menyabitkan perayu-perayu dengan pengedaran di bawah s 39B(1)(a) ADB. Tetapi memandangkan kereta adalah dalam milikan mereka di mana kanabis dijumpai dan menggunapakai anggapan di bawah s 37(d) ADB, mereka dianggap mempunyai milikan terhadap dadah tersebut. Memandangkan undang-undang tidak membenarkan anggapan berganda, perayu-perayu tidak dapat dikatakan telah mengedar kanabis dalam ketiadaan apa-apa keterangan untuk menunjukkan bahawa terdapat pengedaran langsung (lihat perenggan 22).

(2) Satu-satunya keterangan yang digunapakai oleh hakim perbicaraan untuk memutuskan bahawa perayu-perayu adalah dalam jagaan atau kawalan terhadap dadah tersebut adalah bahawa (a) pada masa material, salah seorang mereka memandu kereta sementara seorang lagi adalah penumpang, dan (b) perayu pertama disaman kerana memandu kereta tersebut tanpa lesen lebih kurang enam bulan sebelumnya. Pemilik kereta ('Zainuddin') tidak pernah dipanggil untuk memberi keterangan semasa perbicaraan. Tidak terdapat apa-apa untuk mencadangkan apa yang terjadi kepada kenderaan di antara tempoh perayu pertama disaman kerana memandu tanpa lesen dan tarikh perayu-perayu ditangkap dalam kes ini. Tidak terdapat keterangan untuk membuktikan bahawa kereta adalah dalam jagaan dan kawalan kedua-dua perayu secara eksklusif sebelum penangkapan mereka. Terdapat banyak inferens yang memihak perayu-perayu yang dapat dibuat daripada fakta; kereta tersebut sebelum ini mungkin telah disewakan kepada pihak ketiga atau kereta tersebut dalam milikan Zainuddin selepas kejadian saman tersebut. Kesemua inferens ini, yang mana mempunyai kesan melepaskan keraguan munasabah atas unsur jagaan dan kawalan, tidak dipertimbangkan oleh mahkamah-mahkamah bawahan, dan adalah salah arah dalam undang-undang (lihat perenggan 7–9).

(3) Pihak pendakwaan mempunyai tugas untuk memanggil kesemua saksi yang perlu penting untuk mendedahkan naratifnya tetapi ini tidak dibuat dalam kes ini. Zainuddin, sebagai pemilik kereta, memegang kunci untuk mendedahkan kejadian, dan tanpa keterangannya terdapat jurang dalam kes pihak pendakwaan. Soalan bagaimana kenderaan berada dalam jagaan dan kawalan perayu-perayu kekal tidak dijawab. Kegagalan untuk memanggil Zainuddin, atau sekurang-kurangnya untuk menyerahkan di bawah s 32(1)(i) Akta Keterangan 1950 penyataan yang direkodkan daripadanya, membangkitkan soalan terhadap siapa yang sebenarnya mengawal kereta tersebut sebelum tarikh perayu-perayu ditangkap (lihat perenggan 10 & 13).

(4) Sepasukan polis yang menyerbu adalah bertindak atas maklumat. Mahkamah Agung pada ketika itu dalam kes *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 telah memutuskan bahawa dalam kes maklumat, beban bukan ke atas pembelaan untuk membuktikan kemungkinan akses oleh orang lain tetapi ke atas pihak pendakwaan untuk mengecualikan kemungkinan tersebut. Kes tersebut menonjolkan bahaya bergantung atas maklumat kerana terdapat kemungkinan bahawa kes-kes sedemikian dadah mungkin diletakkan untuk membabitkan tertuduh; maka, pihak pendakwaan adalah perlu untuk mengecualikan kemungkinan bahawa individu lain mungkin mempunyai akses kepada dadah yang dipersoalkan. Dalam kes ini, pihak pendakwaan gagal untuk mengecualikan kemungkinan bahawa orang lain mungkin mempunyai akses kepada kereta tersebut sebelum hari perayu-perayu ditangkap. Tidak terdapat keterangan untuk menunjukkan berapa lama kereta tersebut dalam milikan perayu-perayu (lihat perenggan 11–12).

(5) Mahkamah bawahan menyimpul daripada tingkah laku perayu-perayu melarikan diri dari tempat kejadian bahawa mereka mempunyai pengetahuan mengenai dadah tersebut. Tingkah laku mereka sebenarnya konsisten dengan hujahan bahawa mereka hanya melarikan diri apabila polis menyatakan 'ada ganja' semasa pemeriksaan kereta tersebut. Tindakan hanya melarikan diri tidak dapat ditafsirkan untuk bermaksud mereka mempunyai pengetahuan terdahulu mengenai dadah kerana tingkah laku mereka juga adalah konsisten dengan tindakan orang tidak bersalah yang dalam keadaan yang sama akan panik dan mencuba untuk mengelak tangkapan apabila disyaki secara salah melakukan jenayah. Kedua-dua perayu telah melepaskan beban menjelaskan tindakan mereka di bawah s 9 Akta Keterangan 1950. Inferens bahawa perayu-perayu tidak mempunyai pengetahuan terhadap dadah dalam kereta boleh dibuat daripada fakta bahawa memandangkan jalan yang membawa kepada sekatan jalan polis adalah lurus dan tertuduh boleh dengan mudah melihat sekatan jalan dari jauh mereka boleh membuat pusingan U atau mencuba melarikan diri sebelum mereka menghampiri sekatan jalan tersebut. Sama juga, selepas berhenti di sekatan jalan,

perayu-perayu telah bekerjasama dengan poils dan tidak melarikan diri dengan serta merta selepas diberitahu untuk turun dari kenderaan tersebut (lihat perenggan 16–18 & 21).

(6) Walaupun perayu-perayu mempunyai jagaan dan kawalan terhadap kereta apabila ia ditahan oleh polis, ini tidak bermaksud mereka mempunyai jagaan dan kawalan terhadap kereta dalam ketiadaan keterangan menunjukkan orang bersalah lain. Ia tidak dapat membangkitkan kepada inferens bahawa dadah milik mereka. Dari segi undang-undang, dengan hanya mempunyai jagaan atau kawalan adalah mencukupi untuk membuktikan 'possession'. Tindakan fizikal jagaan atau kawalan perlu disertai dengan keterangan bahawa tertuduh mempunyai pengetahuan terhadap dadah. Dalam ketiadaan apa-apa anggapan statutori, pengetahuan perlu dibuktikan sama ada oleh keterangan langsung atau keterangan keadaan. Pengetahuan semata-mata tanpa sama ada jagaan atau kawalan fizikal secara eksklusif adalah tidak mencukupi dari segi undang-undang untuk membentuk milikan, apa lagi pengedaran (lihat perenggan 14–15).]

Notes

For cases on trafficking in dangerous drugs, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2178–2187.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Jones v Dunkel (1959) 101 CLR 298, HC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Nasrul Annuar bin Abd Samad v PP [2005] 1 MLJ 619; [2005] 1 CLJ 193, HC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Ridwan v PP [2010] 4 CLJ 570, CA (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 37(d), (da), (da)(vi), 39A(2), 39B(1)(a), 39B(2)
Evidence Act 1950 ss 8(2), 9, 32(1)(i)
Penal Code s 34

Amer Hamzah bin Arshad (Zain & Co) for the first appellant.
Hoh Lee Ian (Athimulan & Co) for the second appellant.

Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zulkefli Makinudin FCJ (delivering judgment of the court):

[1] Both the appellants were jointly charged before the High Court at Kota Bharu in the State of Kelantan with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 38,499.68g of cannabis ('the said drug') and punishable under s 39B(2) of the same Act read with s 34 of the Penal Code. They were tried and convicted by the High Court on the charge and sentenced to death. Their appeal before the Court of Appeal was heard and subsequently dismissed. They now appeal to this court against the decision of the Court of Appeal dismissing their appeal. Before the High Court the first appellant, Ibrahim bin Mohamad was referred to and identified as the second accused and the second appellant, Azhar bin Mahamat as the first accused. We shall refer to them herein as they were before the High Court.

[2] The relevant facts of the prosecution's case are as follows:

Acting on information received, a police raiding party led by PW4 stopped a car bearing the registration number CAC 9493 ('the vehicle') which was travelling from Jeli along KM100 of Kota Bharu/Grik road on 8 November 1999. It is the prosecution's case that the second accused as the passenger together with the driver of the vehicle, the first accused had ran away during the inspection of the said vehicle by PW4. The first accused and the second accused were subsequently apprehended. Both the accused and the vehicle were subsequently brought to PW4's office and upon further inspection PW4 discovered 40 transparent plastic packages suspected to be cannabis at the back seat rest of the vehicle. The chemist ('PW1') upon analysis confirmed these 40 transparent plastic packages contained cannabis as defined under s 2 of the Act.

[3] The learned trial judge of the High Court at the conclusion of the trial convicted both the accused and held that the prosecution had proved beyond reasonable doubt that the first accused and the second accused were in possession of the said drugs and the element of trafficking was proved by virtue of the fact that the weight of the said cannabis exceeds the statutory threshold under s 37(da)(vi) of the Act.

[4] The Court of Appeal in affirming the decision of the High Court had, inter alia, made the pertinent findings against both the accused that they were in custody and control of the said drugs by virtue of being in custody and control of the vehicle and that they had the knowledge of the said drugs by virtue of their conduct in running away from the scene of the crime.

[5] Both the accused in their petition of appeal before this court had laid out several grounds of appeal. However, we invited learned counsels for the accused and the learned deputy public prosecutor to focus their arguments in this appeal on the question of whether on the evidence adduced by the prosecution it can safely be concluded that both the accused had mens rea possession of the drugs in the vehicle independent of the statutory presumption under s 37(d) of the Act.

[6] It is trite law that possession is an important ingredient in the charge of trafficking. Unless there is direct evidence of trafficking, the prosecution must prove the ingredient of 'possession' and the trial judge must make an affirmative finding of 'possession' before the presumption of trafficking under s 37(da) of the Act can be invoked (see the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273).

[7] In the present case the only evidence which the learned trial judge had relied upon in order to conclude that both the accused were in custody or control of the drugs are as follows:

(a) that the first accused was the driver of the vehicle and the second accused was the passenger on the date of the arrest; and

(b) that the second accused was previously summoned for driving the vehicle without licence in Kulim, Kedah on 14 May 1999, about six months prior to the date of his arrest in the present case.

[8] We are of the view notwithstanding the fact that the first accused and the second accused were in the vehicle when it was stopped at the road block for inspection, neither the first accused nor the second accused was the registered owner of the vehicle. The owner of the said vehicle is one, Mohd Zainuddin bin Tolan ('Zainuddin'), who was never called to testify as a prosecution witness. It is apparent that the courts below had concluded that the second accused had custody and control over the drugs on the mere facts that he was a passenger of the vehicle on the date of arrest and that several months prior to the date of arrest the second accused was summoned for driving the vehicle without a licence in Kedah. There is nothing to suggest as to what happened to the vehicle in between that period he was summoned in Kedah until the date of his arrest in the present case. A fact cannot be said to have been proved by a presumption. A finding must be based on proved facts or inferences drawn from proved facts. On this point in the case of *Nasrul Annuar bin Abd Samad v Public Prosecutor* [2005] 1 MLJ 619; [2005] 1 CLJ 193, Augustine Paul JCA (as he then was) referred to and adopted the principle as laid down by Kitto J in *Jones v Dunkel* (1959) 101 CLR 298 as follows:

> One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggest, that is to say provides a reason, special

> to the particular case under consideration, for thinking it likely that in that case a specific event happened or a specific state of affairs existed.

[9] It is our finding that there is no evidence to prove that both the accused were exclusively in custody and control of the vehicle prior to their arrest. There are so many favourable inferences that can be made from the existing factual matrix of this case. The vehicle could have been previously rented to a third party or Zainuddin could have taken possession of the said vehicle after the summons incident in Kedah. All these inferences which are favourable to both the accused were never considered by the High Court and the Court of Appeal. These inferences have the effect of casting reasonable doubt on the element of custody and control. The failure on part of the courts below to consider this issue in our view is a misdirection in law.

[10] Whilst it is not denied that the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it has a duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution's case. This was not done in the present case. The question as to how the vehicle came into the custody and control of both the accused still remains unanswered. We are of the view that Zainuddin being the registered owner of the vehicle is the one who holds the key to the unfolding of events, without which there are gaps in the prosecution's case (see the case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433).

[11] It is also pertinent to take note in the present case that the police raiding party were acting on a tip-off which led to the arrest and detention of both the accused. The relevance of this established fact can be seen in the decision of the then Supreme Court in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 where it was, inter alia, held as follows:

> Given the fact that this was a case where the police were acting on a tip-off, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

[12] The Supreme Court in *Abdullah Zawawi* had therefore highlighted the danger of relying on a tip-off's case as there is a possibility that in such a situation the drugs may have been planted in order to implicate the accused. Hence the need for the prosecution to exclude the possibilities that other individuals may have access to the drugs in question. We find on a proper perusal of the evidence it would show that the prosecution had failed to exclude the possibility of others having access to the said vehicle. No evidence whatsoever was adduced by the prosecution to exclude the possibility that Zainuddin and/or other individuals had access to the vehicle prior to the date of arrest. This is further compounded when the courts below erroneously took the position that the failure to call Zainuddin is not fatal as he was not together

A with both the accused when they were arrested. We also noted even Zainuddin's statement that was taken from him was not adduced and tendered as evidence pursuant to s 32(1)(i) of the Evidence Act 1950 if at all for some valid reasons Zainuddin could not be called to give evidence.

B **[13]** It is our considered view that the failure on the part of the prosecution to call the owner of the vehicle or at the very least to tender his statement pursuant to s 32(1)(i) of the Evidence Act 1950 raises the question as to who was in actual control of the vehicle immediately prior to the date of arrest. The C prosecution had failed to exclude the possibility that other individuals could not have had custody or control of the vehicle immediately prior to the date of arrest. No explanation whatsoever was offered by the prosecution as to what had happened to the vehicle from the date when the second accused was summoned in Kulim, Kedah up to the date when the vehicle was stopped at the D road block. There is no evidence to indicate for how long both the accused had been in possession of the vehicle.

[14] The mere facts that the second accused was found in the vehicle and that he was previously summoned for driving the vehicle somewhat E approximately six months prior to the date of arrest are insufficient for the court to make an inference that he had exclusive custody or control over the vehicle. Even if the learned trial judge was correct in deciding that both the accused were in custody or control of the vehicle when they were stopped by the police party, this could not be translated into having custody or control over the F said drugs in the absence of other incriminating evidence against them. It could not have given rise to the inference that the said drugs belonged to them (see the case of *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561).

[15] The law is well settled that having only custody or control over the said G drugs is insufficient to establish 'possession'. The physical act of custody or control must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or H both is insufficient in law to constitute possession, let alone trafficking (see the case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237).

[16] In the present case, the learned trial judge made the inference that both the accused had knowledge of the said drugs by relying on their conduct after I they were arrested, in particular their act of fleeing from the scene. This was affirmed by the Court of Appeal. On this point we are of the view the trial judge had clearly overlooked the other inferences that could have been made from the act of fleeing or absconding. Where there are two or more inferences that could be made the inference most favourable to the accused must be drawn (see the

case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203).

[17] Whilst the conduct of the accused fleeing the scene may be a relevant factor to be considered, such a conduct however must be weighed against the circumstances of the case. This is because even an innocent man may feel panicky and try to evade arrest when wrongly suspected of committing a crime. It is a common instinct of self-preservation. As regards the present case it is noted that the road leading to the 'road block' is a straight road and therefore the first accused being the driver of the vehicle could have easily seen the 'road block' miles away. The fact that the first accused did not make a u-turn or attempt to run away before approaching the 'road block' can give rise to an inference that both the first accused and the second accused had no knowledge of the drugs in the vehicle.

[18] To further support the contention that the first accused and the second accused had no knowledge of the drugs is the fact that both of them upon being asked to stop at the 'road block' had co-operated with the police. The first accused alighted from the car, produced his driving identity card and opened the boot upon being instructed to do so by the police officer. If both of them had prior knowledge of the drugs in question, they could have bolted away immediately upon being ask to alight from the vehicle or even before reaching the 'road block'. It is apparent that this factual matrix of the case was overlooked and failed to be duly appreciated by the courts below. The conduct of the first accused and the second accused are consistent with their contention that both of them only fled upon being told that there were drugs in the vehicle.

[19] The prior conduct of both the accused in the present case to show that they lack the mens rea of knowledge is relevant under s 8(2) of the Evidence Act 1950 which provides as follows:

> 8 Motive, preparation and previous or subsequent conduct.
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[20] Based on the above s 8(2) of the Evidence Act 1950, there are two types of conduct which is relevant, namely prior and subsequent conduct. Evidence of conduct is an equivocal act and is capable of more than one interpretation.

A Accordingly, evidence of conduct must not be referred to in isolation. Instead, conduct must be considered with other evidence or circumstances. In the present case it can be argued that both the accused had no knowledge about there being the said drugs in the vehicle. This is because they had not attempted to escape when they were in a position to do so upon seeing the existence of a B police road block. Apart from that both the accused did not portray any form of suspicious behaviour. All these are indication of their state of mind, namely that they had no knowledge about the presence of drugs in the vehicle. On this point a comparison can be made with the factual circumstances as in the case of *Ridwan v Public Prosecutor* [2010] 4 CLJ 570. In that case, the appellant was C charged for the offence of drug trafficking. The appellant was seen behaving suspiciously and upon approaching the custom checkpoint, the appellant started retreating and running towards the immigration counter before he was eventually apprehended by security officers. The court found the prior conduct of the appellant before being arrested showed he was behaving suspiciously and D therefore it can be inferred that he had the mens rea to commit the offence.

[21] In the present case both the first accused and the second accused had testified that they heard the prosecution witnesses saying 'ada ganja' during the E inspection of the vehicle and it was only at that moment that both of them ran away. The mere act of them running away from the scene after they heard the word 'ganja' cannot be interpreted to mean that they had prior knowledge of the said drugs. This is because the conduct is also equally consistent with the act of an innocent man who was in the state of panic and trying to evade arrest F when wrongly suspected of committing a crime. We find both the accused in their defence had put forward sufficient explanation as to their conduct of running away from the scene of the crime. In this regard they had therefore discharged the onus of explaining their conduct as provided for under s 9 of the Evidence Act (see the case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 G MLJ 19; [2009] 1 CLJ 717).

[22] For the reasons abovestated we find that it is not safe to convict both the accused on the charge of trafficking under s 39B(1)(a) of the Act. However, we find that both the accused were in possession of the vehicle where the said drugs H were found and applying the presumption under s 37(d) of the Act they are deemed to be in possession of the said drugs. As the law does not permit double presumption both the accused cannot be said to be trafficking in the said drugs in the absence of any other evidence to show that there was direct trafficking. We therefore allow this appeal and set aside the conviction and sentence of the I court below. We herein substitute it with one of possession under section 6 of the Act and punishable under s 39A(2) of the Act read with s 34 of the Penal Code. In view of the large quantity of the said drugs found in possession of both the accused we sentence both the accused to twenty years imprisonment from the date of arrest plus the mandatory ten strokes of whipping.

Appeal allowed. Substituting trafficking conviction and sentence with conviction for possession and sentenced both appellants to 20 years' jail and mandatory strokes of whipping.

Reported by Ashok Kumar